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International Law Commission

Seventieth session (second part)

Provisional summary record of the 3437th meeting

Held at the Palais des Nations, Geneva, on Friday, 27 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair drew attention to the revised programme of work for what remained of the session, as proposed by the enlarged Bureau, and said that the meeting of the Planning Group originally scheduled for that morning had been postponed until the afternoon of Monday, 30 July 2018. If he heard no objection, he would take it that the Commission wished to adopt the programme of work, as amended.

It was so decided.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VII. Provisional application of treaties (*continued*) (A/CN.4/L.920 and A/CN.4/L.920/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.920.

Title of section C and heading 1

The Chair recalled that, at the end of the previous meeting devoted to the discussion of the draft report, the title of section C and heading 1 had been left in abeyance pending a review of the Commission's relevant practice. The Secretariat, having looked back at the reports produced by the Commission over the previous decade, had determined that the Commission's usual practice was, as noted by Mr. Park, to include the words "on first reading" after "adopted by the Commission". The only exceptions had been made in 2016, when the Commission had decided, for reasons unknown, not to include the words "on first reading" when adopting its draft conclusions on identification of customary international law and its draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Furthermore, the Commission's consistent practice was to stop after the words "on first reading" and not to continue with the words "at its nth session". He therefore proposed that the title of section C should read: "Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission on first reading."

It was so decided.

Mr. Tladi said that, according to his understanding, it was not the Commission's practice to use the words "draft guidelines constituting the". Heading 1 should be amended accordingly.

Mr. Murphy proposed that heading 1 should read: "Text of the draft Guide to Provisional Application of Treaties."

It was so decided.

Paragraph 11

Mr. Llewellyn (Secretary to the Commission) said that, in the interests of consistency with the title of section C and heading 1, the paragraph should be redrafted to read: "The text of the draft Guide to Provisional Application of Treaties adopted by the Commission on first reading is reproduced below."

Paragraph 11, as amended, was adopted.

The Chair, recalling that the Commission had already adopted the draft guidelines on provisional application of treaties on 31 May 2018, said he took it that the Commission wished to adopt document A/CN.4/L.920, as amended, as a whole.

The portion of chapter VII of the draft report contained in document A/CN.4/L.920, as amended, as a whole, as adopted.

The Chair invited the Commission to consider the portion of chapter VII of the draft report contained in document A/CN.4/L.920/Add.1.

Title of section C and heading 2

The Chair said that the title of section C and heading 2 should be amended to reflect the changes made to the title of section C and heading 1 in document A/CN.4/L.920.

It was so decided.

Paragraph 1

Mr. Park proposed the insertion of a footnote at the end of the paragraph to explain the relationship between the commentaries in document A/CN.4/L.920/Add.1 and those contained in the Commission's report on the work of its sixty-ninth session (A/72/10), which were different. The footnote would read: "The commentaries reproduced in 2017 in the report of the International Law Commission are replaced by this current set of commentaries."

Mr. Gómez-Robledo (Special Rapporteur), supported by **Mr. Tladi** and **Mr. Nolte**, said that, while he did not object to adding such a footnote, he did not think it necessary. It seemed logical that the commentaries had been modified since 2017, not only because two new draft guidelines had been added since then but also because a number of comments made in the plenary meetings of the Commission and in the Drafting Committee had prompted him to make changes.

Mr. Tladi said that the footnote proposed by Mr. Park might even cause confusion in the context of other topics, as it implied that commentaries adopted on first reading did not automatically replace previous sets of commentaries.

The Chair said that the paragraph should be amended to reflect the changes made to paragraph 11 of document A/CN.4/L.920.

Paragraph 1 was adopted on that understanding.

General commentary

Paragraph (1)

Mr. Murphy said that he had communicated a number of proposed changes that he viewed as non-substantive directly to the Special Rapporteur, as he had the impression that such proposals did not need to be raised in plenary meetings of the Commission.

Mr. Tladi, supported by **Mr. Ouazzani Chahdi**, said that changes that appeared minor might nevertheless have substantive implications. Given the difficulty in determining what was substantive and what was not, he would caution against the approach taken by Mr. Murphy.

Mr. Gómez-Robledo (Special Rapporteur) said that, while he understood the concern expressed by Mr. Tladi, it had been his intention to incorporate several non-substantive proposals from Mr. Murphy and Mr. Nolte at a later stage with the help of the Secretariat. If, however, the prevailing opinion was that he should read out each of the proposals in plenary meetings of the Commission, he would do so.

Mr. Ouazzani Chahdi asked whether the language groups would have an opportunity to examine the proposals that had been submitted directly to the Special Rapporteur.

The Chair said that he agreed with Mr. Tladi. The issue of transparency had become a sensitive one within the Commission, so, even if it took some time, the full Commission should be made aware of any and all proposed changes to the text. He therefore suggested that the Special Rapporteur should read out, in English, the proposals put forward by Mr. Murphy and Mr. Nolte. The language groups would meet at a later stage to amend the other language versions to reflect the text as adopted in English by the Commission.

Mr. Gómez-Robledo (Special Rapporteur) said that, in the second sentence of paragraph (1), Mr. Murphy had proposed that the word "They" should be replaced with "States, international organizations and other users". In the last sentence, Mr. Nolte had

raised a concern about the use of the conjunctions "and/or". He therefore proposed to delete the words "and/or to the solutions".

Sir Michael Wood said that, although he agreed with the approach suggested by the Chair, he was not sure that all proposed changes needed to be discussed by the Commission meeting in plenary. Proposals to correct spelling mistakes and minor punctuation issues could, in his view, be submitted directly to the Secretariat. That said, however, the amended version of the last sentence, as proposed by the Special Rapporteur, did not seem to constitute an improvement.

Mr. Nolte said that he had sent some proposals directly to the Special Rapporteur with the aim of facilitating the adoption of the report, and not in the expectation of having them accepted in a manner that was not fully transparent. His preference would be to end the last sentence after the words "existing rules" or, failing that, to replace "and/or" with "and".

Mr. Park said that he agreed with the approach suggested by the Chair. In the last sentence, he would be in favour of inserting the word "possible" before "solutions", as he was not convinced that it was accurate to state that the draft guidelines reflected existing rules.

Sir Michael Wood said that he would prefer to simplify the last sentence by replacing the words "and/or to the solutions that seem" with "and". Stating that the draft guidelines were consistent with existing rules was not the same as claiming that they all reflected existing rules.

Mr. Gómez-Robledo (Special Rapporteur) said that the insertion of the word "possible" would significantly weaken the paragraph. The purpose of the last sentence was simply to make clear that whatever answers users found in the Guide were consistent with existing rules.

Mr. Rajput said that the words "seem most appropriate" were liable to cause confusion. Throughout the general commentary, the Commission should refer to "existing rules and contemporary practice".

Mr. Nolte said that he agreed with the proposal made by Sir Michael Wood. The decision of whether to refer to "existing rules" and "contemporary practice" concurrently should be made on a case-by-case basis.

The Chair said that he was also in favour of a paragraph-by-paragraph approach. It should be left to the Special Rapporteur to determine whether a proposal was substantive and ought to be brought to the attention of the Commission meeting in plenary.

Sir Michael Wood said that, in the revised general commentaries to the draft conclusions on identification of customary international law and the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the equivalents of footnote 1 had been elevated to the status of separate paragraphs in order to emphasize them. He proposed that the same method should be applied in the document under consideration through the insertion of a new paragraph (2) to replace footnote 1.

The Chair, supported by **Mr. Gómez-Robledo** (Special Rapporteur), said that, although he agreed with the proposal to make footnote 1 a paragraph of the commentary, it should, in his view, become a new paragraph (1), as it was applicable to all the paragraphs in the general commentary, including existing paragraph (1).

Mr. Saboia proposed that the content of the footnote should be placed in a new paragraph 2 under heading 2.

Sir Michael Wood, supported by **Mr. Nolte**, said that the text of the footnote would be better placed in the body of the general commentary, to which it applied, rather than in the subsection under heading 2, which was of a procedural nature.

Mr. Murphy said that the footnote would be somewhat stark as a separate paragraph. His preference would be for it to become the new last sentence of paragraph (1).

Sir Michael Wood said that the whole point of elevating the footnote to the status of a separate paragraph was for it to be stark and thereby capture the attention of readers from outside the Commission.

Mr. Tladi said that Mr. Murphy's proposal was a good compromise. Although it was wise to highlight the importance of the general commentary, care should be taken not to overemphasize it and create the impression that it was as important as the draft guidelines themselves. After all, some issues that Commission members had been unable to agree upon for inclusion in the draft guidelines had instead been addressed in the general commentary.

The Chair suggested that, to resolve the impasse, the Commission should defer to the wishes of the Special Rapporteur.

Mr. Murphy said that he would be prepared to accept that suggestion, but that the same principle should then be applied to all the Commission's projects.

Mr. Rajput said that, in the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and the draft conclusions on identification of customary international law, the wording concerned constituted paragraph (2), which followed the general introduction in paragraph (1). He suggested that the same should be done in the current case.

Mr. Saboia said, for the record, that he was prepared to agree with either proposed solution but shared Mr. Tladi's concerns about emphasis being put on the commentaries rather than the adopted text.

Mr. Nolte said that, while he agreed with Mr. Saboia and Mr. Tladi that the commentaries should not be overemphasized, they should not be underemphasized either, or outsiders might not realize the extensive deliberations that the Commission had engaged in during their drafting. In his opinion, the wording of footnote 1 implied not that the commentaries had the same status as, but rather that they elucidated, the draft guidelines. He proposed that the wording might usefully be taken up, or at least alluded to, in all the Commission's outputs.

The Chair, noting that the wording indicated that the footnotes were to be read together with, not interpreted in the light of, the commentaries, said he took it that the Commission wished to move footnote 1 to the text of the commentary as a new paragraph (1) and that its wording should be taken up in the two remaining topics under discussion during the current session. However, the decision to do so would not affect the Commission's future texts.

Mr. Llewellyn (Secretary to the Commission) said that the new paragraph (1) under the title "General commentary" would thus read: "As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries."

Mr. Rajput said that, although he would prefer to see that wording inserted as paragraph (2), he would be prepared to accept the current proposal if the special rapporteurs for the two other topics agreed to include the same wording in their draft texts.

The Chair, noting the agreement of the two special rapporteurs concerned to that proposal, said that the wording would be followed in their texts. He took it that the Commission wished to move footnote 1 to a new paragraph (1) and renumber subsequent paragraphs and footnotes accordingly.

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that Mr. Nolte had made a number of proposals, with which he agreed, for changes to paragraph (2). The first proposal was to delete the whole of the second sentence because its content was included in the corresponding guideline. The second proposal was to remove the second quotation from the

third sentence for purposes of clarity. The third proposal was to insert, after "to build trust" in the fourth sentence, the words "in advance of entry into force".

The Chair suggested that the Commission might like to consider each of the proposals in turn. He saw no objection to the first proposal and therefore took it that the Commission wished to delete the second sentence of the paragraph.

It was so decided.

Sir Michael Wood said that, in respect of the second proposal, he considered the final phrase of the second quotation in the third sentence to be somewhat misleading, as it emphasized that a treaty or provisions could be applied for "a limited period of time" whereas, for instance, the General Agreement on Tariffs and Trade, which fell into the category concerned, had been applied for over 40 years, a period that could not be defined as "limited".

Mr. Nolte said that the phrase "for a limited period of time" should be understood in the legal sense, the actual duration of such application in no way affecting its temporary nature. He would like to see the first quotation, rather than the second, removed from the third sentence, because it mentioned the "application of and binding adherence to a treaty's terms", which to a certain extent pre-empted the Commission's later wording in the relevant draft guideline.

Mr. Park said that he would favour retaining both quotations because of the importance of the sources from which they were taken. For the purposes of clarity, he proposed replacing the word "and" between the two quotations with "or".

Mr. Murphy said that the issue was whether the Commission wished to communicate to the reader at the outset the general context of the provisional application of treaties. The current wording indicated that the sources cited were not the only ones that offered definitions. In that regard, it might be helpful to include the words "by writers" after "the concept has been defined". He agreed with Mr. Park's proposal but would accept whatever the Special Rapporteur preferred.

Mr. Rajput said that the value added by the third sentence was to be found in its references to the literature. However, its meaning was the same as that of the first sentence of the paragraph and so it was not really necessary; one solution might be to include the quotations in the footnotes. To avoid creating confusion about the meaning of provisional application, the Commission should not rely on the literature for definitions. He was not in favour of Mr. Park's proposal to replace "and" with "or", as that would introduce the possibility of choosing between definitions from the literature.

Sir Michael Wood, agreeing with Mr. Rajput, said that the source given in footnote 2 was an important one. Footnote 3, which had disappeared with the deletion of the second sentence of the paragraph, could, together with the references in footnotes 4 and 5, be usefully included in footnote 2, which would thus bring together a number of key academic works. The third sentence of paragraph (2) could then be deleted, which would avoid the Commission being seen to be endorsing specific definitions at the outset of its work.

Mr. Gómez-Robledo (Special Rapporteur) said that his intention in beginning the general commentary with references to the literature had been to provide a sense of the direction of the guidelines. He agreed with Mr. Park's proposal, but also welcomed that of Sir Michael Wood. He therefore proposed that the third sentence of paragraph (2), with the words "by writers" added after "The concept has been defined" and including the two citations with their corresponding references, should be converted into a single footnote.

Sir Michael Wood said that the marker for the proposed new footnote should be placed at the end of the first sentence of paragraph (2). As an expansion of the current footnote 2, the new footnote would refer to the sources given in current footnotes 2 and 3, and then include the sentence containing the two quotations, as the Special Rapporteur had proposed, and their references, which were currently given in footnotes 4 and 5.

The Chair said that, as he saw no objections, he took it that the members agreed to the proposal.

It was so decided.

The Chair, referring to the third proposal presented by the Special Rapporteur, said that, as he saw no objections, he took it that the members agreed to the inclusion, in the fourth sentence of paragraph (2), of the words "in advance of entry into force" after "to build trust".

It was so decided.

Mr. Murphy said that he had also made a proposal in respect of paragraph (2), that the word "essentially" should be deleted from the final sentence because it might raise questions about the voluntary nature of the mechanism.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with the proposal.

The Chair said that, as he saw no objections, he took it that the members agreed to Mr. Murphy's proposal.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Nguyen, noting that much of the wording of the first sentence of paragraph (3) was the same as that of paragraph 1 under heading 2, proposed that the sentence should be deleted.

Mr. Park, referring to the second sentence of paragraph (3), said that not all the draft guidelines reflected existing rules of international law. For example, progressive development had been mentioned in the context of draft guideline 7, on reservations, and in the context of international organizations. He therefore proposed inserting the words "and progressive development" in the second sentence, between "existing rules" and "of international law".

Mr. Rajput said that, rather than the words "and progressive development", he would prefer to insert "and contemporary practice", which was mentioned in paragraph (1).

Mr. Nolte said that he did not consider draft guideline 7 or draft guideline 9, to which he presumed Mr. Park was also referring, as examples of progressive development. Rather, they reflected existing rules of international law. However, it was true that there was no practice involving reservations in respect of the provisional application of a treaty. Nonetheless, that did not mean that such a reservation would not be in conformity with or would not reflect international law. He was of the view that the guidelines did reflect international law and he did not see any instance of progressive development in them. Adding the suggested words would cast doubt on the significance of every other guideline and undermine their purpose.

Sir Michael Wood said that he agreed with Mr. Rajput that paragraph (1) could serve as inspiration, and suggested that the second part of the second sentence should read "the draft guidelines are consistent with existing rules of international law and contemporary practice".

Mr. Gómez-Robledo (Special Rapporteur) said that he would caution against Mr. Park's proposal, as there were still divergent opinions within the Commission about the guideline on reservations, and it might be decided on second reading to omit any reference at all to reservations. He agreed that the first sentence of paragraph (3) might be redundant and could be deleted. The current second sentence could then be reformulated appropriately, as proposed by Mr. Rajput and then Sir Michael Wood, but without any further additions.

Mr. Nolte said that he would propose amending the second part of the sentence to read "the draft guidelines elaborate upon existing rules of international law, in the light of contemporary practice".

Mr. Park said that, although he did not wish to start a discussion with Mr. Nolte on the definition of "existing rules of international law", he wondered how it was possible to speak of an existing rule, *lex lata*, without there being any practice. Without sufficient

practice, it would simply be *lex ferenda*. In respect of Mr. Rajput's proposal, he was somewhat hesitant, as he was not sure what "contemporary practice" was in the given context, particularly with respect to reservations. While he would endorse most of the guidelines, there was as yet no contemporary practice on some of them.

Mr. Petrič said that the original formulation of the second sentence was a little unclear and he could understand the concern expressed by Mr. Park, Mr. Rajput and others. It might be helpful to redraft the first part of the sentence in such a way as to stress the fact that the guidelines were not legally binding, although they reflected existing rules of international law.

Mr. Šturma said that he was unsure whether the word "reflect" was the most appropriate choice.

Mr. Nolte said that it appeared that the Special Rapporteur had used the word "reflect" precisely because the draft guidelines themselves were not binding but did elucidate existing rules of international law. With regard to Mr. Park's remark about *lex lata* and *lex ferenda*, there were certain provisions of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, such as common article 64, which had never been applied. The absence of practice, however, did not mean that article 64 was not a rule of international law.

Mr. Ouazzani Chahdi proposed inserting the word "may" before "reflect" [*les projets de directive peuvent constituer le reflet de règles de droit international existantes*].

Mr. Gómez-Robledo (Special Rapporteur) said that the proposal made by Mr. Ouazzani Chahdi appeared to seek to diminish the scope and authority of the draft guidelines as a whole. Although care had been taken not to accord the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations the status of customary law, it could not be denied that the draft guidelines had taken inspiration from international law. Discussions of such fundamental questions had already taken place during plenary meetings of the Commission and should not be reopened. It would be preferable to keep the original wording of the sentence rather than add a verb that would weaken the draft as a whole. The Commission could discuss the point further if the draft guidelines were criticized in the Sixth Committee.

Mr. Murphy said that an alternative course of action would be to delete the second sentence entirely. The third sentence already captured the idea that the draft guidelines were, for the most part, grounded in the 1969 and 1986 Vienna Conventions on the law of treaties. To address Mr. Park's concern, the words "which they try to clarify and explain, and on the practice of States" could be changed to "which they try to clarify, explain and develop, based on the practice of States".

Sir Michael Wood said that he agreed with Mr. Murphy's suggestion to delete the second sentence. The third sentence, even without the changes proposed by Mr. Murphy, captured the meaning that was intended in the second sentence.

Mr. Nguyen said that he supported the proposal by Sir Michael Wood. He himself wished to propose using the words "most appropriate contemporary practice", which appeared in paragraph (1), since the draft guidelines did not reflect all contemporary practices, nor did they reflect new developments in international law.

Mr. Gómez-Robledo (Special Rapporteur) said that he preferred to retain the second sentence, believing that it was important to state from the outset that the draft guidelines were not intended to be legally binding. It was unclear, moreover, where Mr. Nguyen was suggesting the words "most appropriate contemporary practice" should be placed.

The Chair said he took it that members wished to delete the first sentence of paragraph (3); the second sentence, as amended by Mr. Nolte, would be retained in accordance with the preference of the Special Rapporteur; and the third sentence would remain unchanged.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Rajput said that the last sentence of paragraph (4) should be deleted because it gave the impression that States and international organizations would have to contract out of the draft guidelines.

Mr. Nolte said that he read the last sentence as saying that it was not necessary for States and international organizations to contract out.

Mr. Gómez-Robledo (Special Rapporteur) said that, at the specific request of a number of Commission members, and in order to emphasize the voluntary nature of provisional application, he had rephrased the sentence that had appeared in chapter V of the Commission's report to the General Assembly on the work of its sixty-ninth session (A/72/10). It was important that the general commentary should stress from the outset that provisional application was eminently flexible.

In the first sentence of paragraph (4), the word "to" should be inserted before the word "cover". In the second sentence, the words "that is consistent" should be replaced with "a general approach is consistent" and the word "keep" should be replaced with "acknowledge".

Mr. Murphy said that, in order to address Mr. Rajput's concern regarding the third sentence, the phrase "the Guide allows States and international organizations to set aside" could be amended to read "the Guide recognizes that States and international organizations may set aside".

Sir Michael Wood proposed that at the end of the third sentence, the words "certain draft guidelines" should be amended to read "the draft guidelines".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murphy proposed inserting the word "certain" before the word "terms" in the second sentence. He said that while the practice of the Economic Community of West African States (ECOWAS), referred to in footnote 11, was a good example of the extensive use of provisional application of treaties, it was not related to the differing use of terms. The footnote should therefore be moved to an earlier location in the commentary; it could perhaps become part of footnote 7.

Sir Michael Wood said that it would be preferable to move the numeral marker for footnote 11 to the end of the second sentence of paragraph (5).

Mr. Saboia said that he had doubts about the appropriateness of the term "definite entry into force", which appeared between quotation marks in the second sentence. Entry into force was a term that already conveyed the notion that the procedure for a treaty's entry into force had been completed.

Mr. Gómez-Robledo (Special Rapporteur) said that, in order to address Mr. Saboia's concern, the quotation marks could be removed from the term "definite entry into force" and the word "definite" could be placed in italics for emphasis. In that way, the term would be differentiated from "provisional entry into force" in the same sentence, which was a direct quote from a number of ECOWAS treaties.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Nolte proposed that the word "will" should be inserted in the first part of the second sentence of paragraph (6), so that it would read "Those draft model clauses will reflect best practices".

Mr. Gómez-Robledo (Special Rapporteur) said that Mr. Murphy had proposed inserting the words "it is anticipated that" before the words "this Guide" in the first sentence.

Mr. Park said that it would be preferable to use the words "desirable practices" rather than "best practices" in the second sentence.

Mr. Jalloh (Chair of the Drafting Committee) said that he was unsure whether the changes proposed by Mr. Nolte and Mr. Park were necessary. Following the discussion in the Drafting Committee, it had been his understanding that some States were interested in receiving guidance. Model clauses reflecting best practices could be useful in that regard since practices varied significantly. "Best practices" was standard terminology and, since the Commission's intention was to determine "best" rather than "desirable" practices, the formulation ought to be maintained.

Mr. Vázquez-Bermúdez said that he agreed with Mr. Jalloh that the wording "best practices" should be retained. Since the Commission intended to draft model clauses but had not yet completed that task, the beginning of the second sentence could perhaps be amended to read "Those draft model clauses would reflect best practice", with "practice" in the singular.

Mr. Nguyen said that, in the first sentence of footnote 16, reference should be made to the footnote that had been moved from paragraph 5 to paragraph 7 of chapter VII of the report, as contained in A/CN.4/L.920, which reproduced the text of the eight draft model clauses so far considered by the Commission.

Mr. Jalloh said that he wished to clarify that, although the draft model clauses had been mentioned in plenary, the Drafting Committee had not yet debated their substance or adopted any of them. In his view, the first sentence of footnote 16 captured the situation accurately.

Mr. Gómez-Robledo (Special Rapporteur) said that it was his intention to work on the draft model clauses in an informal manner at the Commission's seventy-first session, rather than wait until the second reading of the draft guidelines at its seventy-second session.

Mr. Murphy said that he supported Mr. Nguyen's proposal, as it would draw Member States' attention to the footnote which contained the draft model clauses. The reference to "the annex" in footnote 16 might be confusing for a reader of the report, since it seemed to point to an already existing annex, whereas in fact the annex would likely be issued at the Commission's seventy-first session.

The Chair said that he too supported the proposal to include a reference to the footnote containing the draft model clauses.

Ms. Galvão Teles (Rapporteur) proposed replacing the phrase "reproduced in an annex" in the first sentence of paragraph (6) with "which are to be included in an annex", for clarity's sake. As for footnote 16, she would be in favour of either removing the reference to "an annex containing such draft model clauses" or inserting a cross-reference, as proposed by Mr. Nguyen.

The Chair suggested that the Commission should entrust the Secretariat and the Special Rapporteur with making the necessary changes to the paragraph and to the related footnote.

Paragraph (6), as amended, was adopted on that understanding.

Paragraph (7)

Mr. Murphy proposed aligning the language of paragraph (7) with the amended language of paragraph (6), so that it would now read: "It is anticipated that a selected bibliography will be reproduced in an annex." That said, it was not clear whether the Special Rapporteur's intention was in fact to include the bibliography as an annex or to issue it as a separate document. He himself was not convinced that a bibliography should be part of the Commission's outcome. A bibliography would be current only as of the date the

Commission completed its work on the topic, and would likely become dated fairly quickly. Another option might be to publish the bibliography as a separate document, similar to what the Commission had done in its work on the topic "Identification of customary international law".

Sir Michael Wood said that, as Special Rapporteur on the topic of identification of customary international law, he saw the bibliography related to that topic as a stand-alone document. Noting that the bibliography drawn up for the current topic was extensive, he said that bibliographies did not have to be given the same treatment from one topic to the next.

Mr. Nolte said that the inclusion of a bibliography had to do with how the Commission positioned itself *vis-à-vis* the academic world. While a bibliography might suggest authority, there was a difference between those commentaries in which academic commentary was cited in the footnotes, as in the Commission's work on the current topic, and others, in which it was not. He was not opposed to the suggestion that a bibliography might be published as a separate document; making it an integral part of the Commission's commentary, on the other hand, would signal that the Commission gave certain books more authority than others, something about which he would have reservations.

Mr. Gómez-Robledo (Special Rapporteur) said that paragraph (7) had been drafted prior to the issuance of his fifth report; as recommended by the Secretariat, he had included the bibliography as an addendum to that report (A/CN.4/718/Add.1). In paragraph (7) he had simply wished to draw the reader's attention to the fact that a bibliography existed as a separate document. He would not be opposed to simply providing such information in a footnote. It was not his intention that the bibliography should form part of the Guide, for the reasons already set out by colleagues.

Mr. Nolte said that if paragraph (7) were to remain as drafted, the Commission would have to examine and discuss the bibliography more closely; he had done so and would have a number of changes to propose. Therefore, while he sympathized with the Special Rapporteur's intentions, he was of the view that the bibliography should not be given more authority by making it look like it was part of the commentary.

The Chair suggested that paragraph (7) should be deleted and that a reference to the bibliography as a stand-alone document should be inserted in paragraph 5 of chapter VII of the report (A/CN.4/L.920).

Paragraph (7) was deleted on that understanding.

The general commentary to the draft Guide to Provisional Application of Treaties, as a whole, was adopted.

Commentary to draft guideline 1 (Scope)

Paragraph (1)

Mr. Nolte proposed deleting the first part of the second sentence, "In establishing the intended parameters of the draft guidelines", which was not clear and seemed unnecessary.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Murphy, noting that footnotes 18 and 19 reproduced the content of article 25 of the 1969 and 1986 Vienna Conventions on the law of treaties, respectively, proposed moving that material to footnotes 8 and 9, which referred to the first mention of those articles. He further proposed that footnote 17 should be moved to the very end of the first sentence of the paragraph.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with both the amendments proposed by Mr. Murphy, subject to their verification by the Secretariat.

Paragraph (3) was adopted on that understanding.

The commentary to draft guideline 1, as a whole, as amended, was adopted, subject to verification by the Secretariat.

Commentary to draft guideline 2 (Purpose)

Paragraph (1)

Paragraph (1) was adopted with minor drafting changes.

Paragraph (2)

Mr. Murphy, drawing attention to the first two sentences of paragraph (10) of the commentary to draft guideline 9, in which the Commission acknowledged the fact that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had not yet entered into force, and accordingly should not be referred to in the same manner as its 1969 counterpart, suggested that it would be apt to move those sentences to the paragraph (2) currently under consideration, where the 1986 Vienna Convention was mentioned for the first time.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft guideline 2, as a whole, as amended, was adopted.

Commentary to draft guideline 3 (General rule)

Paragraph (1)

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Mr. Nolte proposed that the last sentence of paragraph (2) was a fitting introduction to the content of paragraph (3) and thus should be incorporated into the latter. In addition, he suggested that, in paragraph (3), the word "existing" in the phrase "a treaty existing among 'negotiating States'" was superfluous and should be deleted. In the penultimate sentence of paragraph (3), he understood that it was the provisional application of certain commodity agreements that extended beyond the termination date. He suggested making that clearer in the text by replacing the phrase "but were extended beyond their termination date" with "but whose provisional application extended beyond their termination date". If that change were to be made, the words "when States extended an agreement that had only been provisionally applied" in the last sentence of paragraph (3) would become superfluous and could be deleted.

Mr. Nguyen proposed that, in the first sentence of paragraph (3), the words "or part of a treaty" should be inserted after the phrase "to provisionally apply a treaty", in order to better reflect the language of article 25 of the 1969 and 1986 Vienna Conventions on the law of treaties.

Paragraphs (2) and (3), as amended, were adopted.

Paragraph (4)

Sir Michael Wood proposed that, in the second sentence, the words "known as" should be replaced with "referred to as". He further proposed that the sentence "The Commission remains of the same view" was superfluous and should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5), as amended, was adopted with minor drafting changes.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Sir Michael Wood said that the modifier "negotiating" in the phrase "negotiating States or international organizations" was too limiting; he proposed deleting it and inserting the word "concerned" after "international organizations".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted with minor drafting changes.

The commentary to draft guideline 3, as a whole, as amended, was adopted.

Commentary to draft guideline 4 (Form of agreement)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted with minor drafting changes.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Nolte proposed that the last sentence of the paragraph should be deleted. While the statement contained therein might hold true from the perspective of an international organization, the Commission was examining the issue from the perspective of the binding character or the establishment of provisional application. Later in the commentary to the guidelines, it was stated that the internal law or rules of an international organization were irrelevant with regard to the binding character or establishment of provisional application. Therefore, the statement that an agreement to establish provisional application must be in conformity with the rules of an organization could create a grave misunderstanding.

Mr. Park said that, in his view, the last sentence of the paragraph constituted a "no-harm" clause.

Mr. Murphy said that he tended to agree with Mr. Nolte's statement concerning the last sentence of the paragraph. He also suggested that a citation in footnote 30 should be updated with newly available publication information.

Mr. Gómez-Robledo (Special Rapporteur) said that in its discussion on the topic of provisional application of treaties, Commission members, in particular Sir Michael Wood, had emphasized that it had to be absolutely clear that any unilateral declaration by a State or an international organization must be accepted by the other States or international organizations concerned. That notion was reflected in the penultimate sentence of paragraph (4). While he had initially seen the last sentence as a necessary supporting statement, he could accept Mr. Nolte's point of view that that sentence might be misleading or even might diminish the importance of the previous sentence, which was the far more meaningful one. He therefore agreed to the deletion of the last sentence of the paragraph.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Nolte said that he would be in favour of replacing the word "clearly", which appeared twice in the paragraph, with the word "verifiably", as it was better to point to evidence, rather than impression.

Mr. Murphy said that he was not opposed to replacing the word "clearly" with "verifiably" the first time it appeared in the paragraph; however, in the second instance, he would suggest simply deleting it, and replacing the word "expressed" with the word "express", so that the end of the penultimate sentence would read "on the condition that it is express". In addition, he proposed that, in footnote 31, rather than citing his own report, the Special Rapporteur should reference existing practice, so that readers of the report could directly consult the source material.

Mr. Park proposed adding a footnote containing examples of existing practice at the end of the third sentence.

Mr. Rajput proposed that, for clarity's sake, the third sentence should be redrafted to read: "Most of the existing practice reflects the acceptance of provisional application in written form."

Sir Michael Wood said that he would be in favour of simply deleting the word "clearly" both times it appeared in the paragraph; he did not support replacing it with the word "verifiably", even in the first instance, as it was not obvious who would be responsible for said verification.

Mr. Gómez-Robledo (Special Rapporteur) agreed with the point made by Sir Michael Wood.

Paragraph (5), as amended and supplemented with a footnote, was adopted.

The commentary to draft guideline 4, as a whole, as amended and supplemented with a footnote, was adopted.

The meeting rose at 1.05 p.m.